TUAN HJ ZULKIFLI HJ HUSSAIN

v.

SURUHANJAYA SEKURITI & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD JCA
[ORIGINATING MOTIONS NO: R1-25-22-2000]
20 DECEMBER 2004

SECURITIES: *Take over - Parties acquiring more than 33% voting rights of company - Obligation to purchase remaining shares - Whether parties can be compelled to purchase remaining shares by securities commission - Whether power to direct compliance applies only after 1 January 1999 - Securities Commissions Act 1993, s. 33D(1)(a) - Malaysian Code on Take-Over and Mergers 1998*

CIVIL PROCEDURE: *Jurisdiction - High Court - Application to set aside order for leave and to strike out originating motion - Whether O. 53 r. 9 Rules of the High Court 1980 prohibits hearing of application*

These were applications by the second and third respondents to set aside an order for leave obtained by the applicant under O. 53 Rules of the High Court 1980 ('RHC') and accordingly to strike off the applicant's originating motion ('OM') sought to be filed against the respondents. The facts showed that the applicant was a shareholder of a company called Palmco Holdings Berhad ('Palmco'). In the OM, he sought for an order of mandamus ordering the first respondent (the Securities Commission) to direct the second and third respondents to acquire the remaining shares in Palmco in accordance with the provisions of the Malaysian Code on Take-Overs and Mergers 1998 ('the 1998 Code'). This was on the ground that the second and third respondents had an obligation to purchase the remaining shares under the 1998 Code when they had acquired shares exceeding 33% of the voting rights of Palmco. The power to direct compliance was given under s. 33D(1)(a) of the Securities Commission Act 1993 ('the Act') by virtue of an amendment to the Act by Act A926 which came into force on 1 January 1999. The hearing of these applications had gone on for 13 days before the applicant raised the issue that the applications were prohibited by virtue of r. 9 of O. 53 RHC that had come into existence after an amendment to the RHC. Rule 9 thereof prohibits an application to set aside any order by the judge made under O. 53 RHC except by way of an appeal. The learned judge however decided to proceed to set out his findings on the merits of these applications. Firstly, whether the

respondents' obligation to purchase the remaining shares arose when the predecessor to the 1998 Code was in force, namely, the 1987 Code wherein non-compliance thereof would result in sanctions brought under s. 33(10) of the Act prior amendment. It was not disputed that the respondent complied with s. 33(10) but only after the amendment.

Held (dismissing the OM):

[1] The purpose of s. 33D of the Act is to provide penalties for defaulting persons imposed by the Securities Commission ('the Commission'). It lays down the "actions" that the Securities Commission may take against defaulting persons. Being actions against defaulting persons, they have to be seen as punitive in nature. Penalties are not intended to be retrospective. It would be unjust to act against the defaulter in a manner more severe than that he was entitled to expect when he committed the default. If the enhanced powers which came into force on 1 January 1999 are exercised in respect of defaults before that date, the defaulters would be burdened with a new liability that they did not have in their contemplation before that date. (pp 360 g-h & 361 a, d)

[2] There was no pending takeover of Palmco by the second and third respondents as at 1 January 1999 so as to be caught under s. 33D(1)(a) of the Act. This was because as at that date the said respondents were claiming that they were not obliged to do so or that they were not liable to be directed to do so. (p 362 f-g)

[3] The power to direct compliance given by s. 33D(1)(a) of the Act is not retrospective and cannot be exercised in respect of defaults occurring before it came into force, ie, 1 January 1999. The respondents' obligation to make a mandatory offer to acquire the remaining shares arose before 1 January 1999. Therefore, there was no question of the first respondent being ordered by mandamus to act under s. 33D(1)(a) of the Act. As such, leave ought not to have been granted. Order 53 r. 9 RHC prohibited the respondents' applications to set aside the order for leave. However, it did not prohibit the court from striking off the OM on the ground that it had no reasonable prospect of success. (pp 363 d-e & 364 d)

Legislation referred to:
Companies Act 1965, s. 179
Federal Constitution, art. 7
Malaysian Code on Take-Overs and Mergers 1997, r. 34.1
Malaysian Code on Take-Overs and Mergers 1998, ss. 6(4), 42
Rules of the High Court 1980, O. 53 rr. 1, 9
Securities Commission Act 1993, ss. 32, 33, 33D(1)(a), 33(10), 34, 42
Securities Commission (Amendment) Act 1995, s. 21

For the applicant - Robert Lazar (Syed Tahir Syed Azman); M/s Shearn Delamore & Co
For the 1st respondent - Logan B Sabapathy (Maidzuara Mohammed); M/s Logan Sabapathy & Co
For the 2nd respondent - S Rutheran (KH Ch'ng & Jahaberdeen Mohd Yunus); M/s R Sivagnanam & Assoc
For the 3rd respondent - V Sivaparanjothi (KT Wong); M/s V Siva & Partners

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Mohamad JCA:
Pursuant to leave granted on 26 July 2000 under O. 53 r. 1 (as then in force) of the Rules of the High Court 1980, on 3 August 2000 the applicant filed an originating motion to obtain against the Securities Commission ("the Commission") the relief that the applicant had been given leave to apply for, namely, "an order of mandamus ordering the Securities Commission to direct IOI Corporation Berhad (IOI) and Tan Sri Dato' Lee Shin Cheng (LSC) to comply with and observe the provisions of the Malaysian Code on Take-Overs and Mergers 1998 (the Code) and in particular to make a mandatory offer to acquire the remaining shares and warrants in Palmco Holdings Berhad (Palmco), not owned by IOI and LSC at a price not less than the highest price paid from the obligation date at the price of RM4.35 and RM2 respectively, and that IOI and LSC be ordered to compensate the shareholders of Palmco in question for the loss suffered by the delay in making the offer". It was also on 3 August 2000 that IOI and LSC became aware of the order granting leave of 26 July 2000.

Having on 1 November 2000 obtained leave to intervene and be added as defendants, on 13 December 2000 IOI (second defendant) and LSC (third defendant) filed separate notices of motion for orders that the leave granted on 26 July 2000 be set aside and that accordingly the originating motion of 3 August 2000 be struck off.

The applicant has raised a point of procedure against IOI's and LSC's applications. On 22 September 2000, after IOI and LSC became aware of the order granting leave and before they applied to intervene, a new O. 53 came into force in substitution of the O. 53 that had been in existence until then. The new O. 53 has in it r. 9 which provides as follows:

> No application to set aside any order made by the Judge shall be entertained, but the aggrieved party may appeal to the Court of Appeal.

No such rule had existed in the substituted O. 53. It is the applicant's point that the order granting leave of 26 July 2000 was an "order made by the judge" within the meaning of r. 9 and that, by virtue of that rule, IOI's and LSC's applications for the setting aside of the order granting leave ought not to be entertained. IOI and LSC, however, argue, besides other things, that r. 9 does not apply to an application for the setting aside of an order made under the previous O. 53, and that it applies only to orders made under the new O. 53.

The point was raised only towards the end of the oral submission in reply of the applicant's counsel on the thirteenth day of hearing, which in the event was to continue on only six more days. Counsel said that he only realized the point that morning. Probably counsel for IOI and LSC too did not realize the point until it was raised; and it would not be surprising if the solicitors for IOI and LSC had overlooked the point when they began to bestir themselves to have the leave set aside.

It is a point that is not devoid of difficulty. I have decided to write out my judgment on the merits of the applications all the same. I feel that even were I to decide the point in favour of the applicant and to strike out these applications, I should still set out my findings on the merits of the applications in case my decision on this point of procedure should be wrong and also because the hearing for thirteen days would go to waste if I did not deal with the merits. And this is what I am now going to do.

I shall first set out the facts and the state of the related law that gave rise to the applicant's desire for the orders of mandamus against the Commission.

At the material time, Palmco's total issued and paid-up capital comprised 159,287,000 shares. On 20 March 1997 the directors of IOI resolved to acquire from Mega First Corporation Berhad 52,463,000 shares (32.936% of the total) at RM4.35 each, and 10,493,000 warrants (32.93% of the total) at RM2 each. IOI sent a public announcement of this to the Kuala Lumpur Stock Exchange ("the KLSE") on the same day. IOI accordingly acquired the 52,463,000

Palmco shares, either on 24 or 25 March 1997. On 25 March 1997 IOI acquired another 38,000 Palmco shares, according to IOI on the open market, bringing IOI's shareholding to 52,501,000 shares (32.96%). On the same day, LSC, IOI's managing director, acquired 77,000 Palmco shares. With that acquisition, the total shareholding of IOI and LSC in Palmco was 52,578,000 or 33.008%. I shall explain what the significance of that is in law.

On 25 March 1997 the Malaysian Code On Take-Overs And Mergers 1987 was in force and had been in force since 1 April 1987. The 1987 Code had been made under powers conferred by s. 179(3) of the Companies Act 1965. It was made by the Panel On Take-Overs And Mergers appointed pursuant to s. 179(2), who were empowered by s. 179(3) to "prepare a code containing general principles and rules to be complied with by all parties concerned in a take-over and merger transaction".

The Securities Commission Act 1993 came into force on 1 March 1993. Part IV of the Act, comprising 3 sections only, 32 to 34, concerned issues of securities and takeovers and mergers. The leading section for takeovers and mergers was s. 33. It provided by subsections (3) and (4) for the creation of a code, to be prepared by the Commission and approved by the Minister, "containing general principles and rules to be complied with by all parties concerned in a take-over and merger transaction". But no code was produced under s. 33. There was already in existence the 1987 Code. What happened was that the 1993 Act, by s. 45, repealed s. 179 of the Companies Act 1965 under which the 1987 Code had been made (and ss. 5 and 6 of the Securities Industry Act 1983 with which we are not concerned) but provided in s. 46 for the continued validity of all "regulations, instructions, orders and decisions made under and in the repealed sections", and these, according to s. 46, "shall be deemed to have been made under the provisions of this Act until they are amended or repealed". In relation to s. 179 of the Companies Act 1965, the 1987 Code would fall within the "regulations, instructions, orders and decisions" that survived the repeal of the section and that were deemed to have been made under the 1993 Act. So the 1987 Code was deemed to be the Code made under s. 33.

Rule 34.1(a) of the 1987 Code provided as follows:

> Except with the consent of the Panel, or unless otherwise directed by the Panel where:
>
> (a) any person acquires, whether by a series of transactions over a period of time or not, shares which (taken together with shares held or acquired by persons acting in concert with him) carry more than 33% of the voting rights of a company;

> such person shall extend within a reasonable period of time an offer on the basis set out below to the holders of any class of share capital which carries votes and in which such person or persons acting in concert hold shares. In addition to such person, each of the principal members of the group of persons acting in concert may, according to the circumstances of the case, have the obligation to extend an offer.

Rule 2 contained a definition of "Acting in concert", a term used in r. 34.1. It gave an actual definition of persons acting in concert as well as reburtable presumptions. According to presumption (2), a company was "presumed to be" a person acting in concert "with any of its directors". If a company's director was, therefore, *vice versa*, presumed to be acting in concert with the company, then, by that presumption, LSC, IOI's director, was acting in concert with IOI, and since the shares held by IOI and LSC on 25 March 1997, taken together, carried more than 33% of the voting rights of Palmco, IOI was obliged by r. 34.1(a) to extend the offer mentioned in it and LSC "may ... have the obligation to extend an offer".

As to failure to observe r. 34.1(a) or any other rule in the 1987 Code, subsections (9) and (10) of s. 33 of the 1993 Act provided as follows:

> (9) Subject to subsections (6), (7) and (8), a failure by any party concerned in a take-over or merger transaction to observe any of the general principles and rules in the Code shall not of itself render that party liable to criminal proceedings but any such failure may, in any proceedings, whether civil or criminal be relied upon by any party to the proceedings as tending to establish or to negate any liability which is in question in the proceedings.
>
> (10) Notwithstanding subsection (9), where any party concerned in a take-over or merger transaction fails to observe any of the general principles and rules in the Code, the Commission may, after giving the party an opportunity to be heard, invoke such sanction as private reprimand, public censure or temporary or permanent deprivation of enjoyment of the facilities of a stock exchange as it deems fit.

The subsections were substantially a re-enactment of subsections (7) and (7A) respectively of the repealed s. 179 of the Companies Act 1965, with the substitution of the Panel On Take-Overs And Mergers in subsection (7A) of the repealed section with the Commission in s. 10 of s. 33 of the 1993 Act.

The applicant, who at the time held 7,743,000 shares in Palmco, came into the picture on 26 May 1997, when he wrote to the Commission to request them to make an investigation relating to IOI's acquisition of Palmco shares. The applicant was apparently not aware of the acquisition of the additional 115,000 (that is 38,000 plus 77,000) shares by I0I and LSC, for the matter that he requested the Commission to investigate was something different. He

informed the Commission that on 19 March 1997 he had learned from one Tjio Kay Leon, an executive director of Palmco, that besides 52,463,000 shares, IOI had agreed to purchase an additional 2 million shares from Tjio. The applicant requested the Commission to investigate whether the sale of the 2 million shares had been carried out. The KLSE, who presumably had been asked to investigate, referred the applicant's letter to IOI for clarification, and on 11 June 1997 IOI, after communicating with Tjio, wrote to the KLSE denying knowledge of the matters stated in the applicant's letter to the Commission.

Further correspondence followed. On 24 June 1997 the applicant again wrote to the Commission to give further information about the supposed sale of the 2 million shares. On 25 November 1997 persons claiming to be bumiputera minority shareholders of Palmco wrote to the Minister of Finance stating their grievances about IOI's acquisition of the 32.936% equity in Palmco and calling for investigation. This letter was referred to the Chairman of the Commission with a request that he reply directly to the persons concerned. On 30 September 1998 persons claiming to be bumiputera minority shareholders and ex-shareholders of Palmco, including the applicant, wrote to the two Ministers of Finance (there were two then) referring to several previous letters of theirs to the Commission and requesting the Ministers to ascertain whether there had been manipulation and misdoing in IOI's taking over of Palmco.

At last on 24 November 1998 the Commission wrote to IOI stating their awareness of the acquisition of the additional 115,000 shares by IOI and LSC, pointing out the requirements of r. 34.1(a) of the 1987 Code, and asking IOI to show cause why action under s. 33(10) of the 1993 Act should not be taken against IOI and LSC for failure to comply with the rule.

On 7 December 1998 IOI, and on 10 December 1998 LSC, separately wrote their explanations to the Commission. They gave a common explanation. The gist of it was that the acquisition's exceeding 33% by 0.008% was inadvertent. It was LSC's purchase of 77,000 shares that resulted in the excess. When LSC gave the purchase direction on 25 March 1997 he was in Australia and he did not have complete knowledge of IOI's actual shareholding in Palmco. Upon realizing the exact percentage after he returned to Malaysia on 26 March 1998, LSC took steps to reverse the position by, it was claimed, disposing of the 77,000 shares completely on 8 April 1997. IOI and LSC claimed that the exceeding of the 33% was a genuine oversight and was not intentional.

The Commission did not decide on the case of IOI and LSC before certain changes in the law relating to takeovers and mergers came into force on 1 January 1999. Had they decided before that date and their decision was to act against IOI and LSC despite their explanation, there would have been no question that the only action that they could have taken would have been under s. 33(10), that is, either give a public reprimand or a private censure or deprive IOI and LSC of the enjoyment of the facilities of a stock exchange. If the Commission had invoked any of those "sanctions" – that was the word used in the section – the applicant would not have been able to see reason to find fault in law with the action of the Commission. But the Commission decided only after those changes took effect.

Before I go on to state what the decision was and what happened subsequently, I shall explain, as far as necessary, what were the changes in the law that took effect on 1 January 1999.

As far as the 1993 Act is concerned, the changes were among those introduced by the Securities Commission (Amendment) Act 1995 (Act A 926) which amended the 1993 Act. The original Part IV of the 1993 Act entitled "Issues of Securities and Take-Overs and Mergers", which as I have said contained three ss. 32 to 34, was replaced by a new Part IV of the same title but consisting of thirteen ss. 32, 32A, 32B, 33, 33A, 33B, 33C, 33D, 33E, 34, 34A, 34B and 34C. The new Part IV is split into two Divisions. Division 1 concerns securities, and comprises ss. 32 to 32B. Division 2 concerns takeovers, mergers and compulsory acquisitions, and comprises the rest of the ss. 33 to 34C. It was Division 2 of Part IV that was brought into force on 1 January 1999, three years after the amending Act A 926 was published in the Gazette on 9 November 1995.

Section 33A empowers the Minister, on the recommendation of the Commission, to prescribe a Code which "shall contain principles and rules governing the conduct of all persons or parties involved in a take-over offer, merger or compulsory acquisition, including an acquirer, offeror, offeree and their officers and associates" (subsection (3)) and which shall be administered by the Commission (subsection (4)). Accordingly, on 31 December 1998 the Minister prescribed the Malaysian Code On Take-Overs And Mergers 1998 ("the 1998 Code"), specifying 1 January 1999 as the date of its coming into force. By its s. 42, the 1998 Code repealed the 1987 Code. So as far as codes are concerned, on 1 January 1999 the 1998 Code came into force in place of the 1987 Code.

Under the new legislative scheme, the obligation to make a take-over offer is expressed in both the Act and the 1998 Code, whereas previously it was expressed only in the 1987 Code, that is in r. 34.1. I shall deal first with the position under the Act. Subsection (2) of the new s. 33B provides as follows:

> Subject to section 33C, an acquirer who has obtained control in a company shall make a take-over offer, other than in respect of voting shares of the company which at the date of the offer are already held by the acquirer or which the acquirer is entitled to exercise, in accordance with the provisions of the Code and any ruling made under subsection 33A(4).

By virtue of the definition of "control" in the new s. 33, an acquirer obtains control in a company for the purposes of subsection (2) of s. 33B when he acquires voting shares of more than 33% in the company. The definition of "acquirer" in the new s. 33 makes two or more persons "acting in concert with one another" also an acquirer. Whereas previously, as has been seen, the concept of acting in concert was dealt with in the 1987 Code, now it is dealt with in the Act itself, in the new s. 33, where subsection (2) gives an actual definition of "persons acting in concert" and subsection (3) lays down rebuttable presumptions, one of which, in para. (b), is that a corporation and any of its directors "shall be presumed to be persons acting in concert". Incidentally, I observe that whereas in the presumptions in r. 2 of the 1987 Code, and in its r. 34.1, the concept was one of a person acting in concert with another person, which might give the impression of the one being accessory to the other – which impression is heightened by r. 34.1 being so worded that the obligation to make the offer seems to fall foremost on one person, that is the person with whom the others act in concert – the concept in the new s. 33 is simply of persons "acting in concert" or "acting in concert with one another", which conveys equality of stature.

As to the manner of making a takeover offer as required by subsection (2) of s. 33B and the time of making it and other matters relating to the making of a takeover offer, the subsection, by the words "in accordance with the provisions of the Code and any ruling made under s. 33A(4)", leaves it to be dealt with by the Code and rulings. As to rulings, the Commission are empowered by s. 33A(4) to:

(a) issue rulings from time to time, interpreting the Code;

(b) issue rulings on the practice and conduct of persons involved in or affected by any take-over offer, merger or compulsory acquisition, or in the course of any take-over, merger or compulsory acquisition;

As to failure to make a takeover offer as required by subsection (2) of s. 33B, subsection (4) makes it an offence punishable with a severe penalty of a fine not exceeding one million ringgit or imprisonment for a term not exceeding ten years or both.

I now turn to the new s. 33D, which is the section that, as will later be seen, has given rise to the controversy in this case. I shall quote it in full:

> (1) Where any person who is under an obligation to comply with, observe or give effect to the provisions of the Code or any ruling made under subsection 33A(4), fails to comply with, observe or give effect to any such provision of the Code or ruling (hereinafter referred to as the "defaulting person"), the Commission may take one or more of the following actions:
>
> (a) direct the defaulting person to comply with, observe or give effect to any such provision of the Code or ruling;
>
> (b) impose a penalty not exceeding two hundred and fifty thousand ringgit on the defaulting person;
>
> (c) reprimand the defaulting person;
>
> (d) direct a stock exchange to deprive the defaulting person access to the facilities of the stock exchange;
>
> (e) where the defaulting person is a listed corporation, direct the stock exchange:
>
> (i) to suspend trading in the securities of the corporation;
>
> (ii) to suspend the listing of the corporation; or
>
> (iii) to remove from the official list the corporation or the class of securities of the corporation;
>
> (f) where the defaulting person is a corporation that is not listed, direct any stock exchange to prohibit the listing of any of its securities; or
>
> (g) direct a stock exchange to prohibit the defaulting person from engaging in transactions to be executed through the use of the facilities of the stock exchange.
>
> (2) The Commission shall give a written notice to a defaulting person of its intention to take action under subsection (1) and shall give the defaulting person an opportunity to be heard prior to it taking any action under subsection (1).
>
> (3) The Court may, in a case where the Commission gives a direction under paragraph (1)(a), on an application by the Commission, make an order directing the defaulting person to comply with, observe or give effect to those provisions of the Code or rulings.

The section gives the Commission certain powers to take action. I shall discuss it in two aspects, namely, the basis for the exercise of the powers, and the scope of the powers as compared to the powers under subsection (10) of the previous s. 33.

The powers can only be exercised if there is failure "to comply with, observe or give effect to the provisions of the Code or any ruling made under subsection 33A(4)". They are not expressed to be exercisable upon failure to make a takeover offer as required by subsection (2) of s. 33B. They may be open to the construction that they are exercisable upon failure to make a takeover offer only if the Code, despite the existence of the requirement to make a takeover offer in subsection (2) of s. 33B, also includes such a requirement, so that failure to observe the requirement falls within s. 33D as a failure to comply with, observe or give effect to a provision of the Code. But the question would then arise whether Parliament, when in 1995 it enacted the obligation to make a takeover offer in s. 33B(2), intended that the Minister, when he comes to prescribing the Code under s. 33A, should also prescribe such a requirement. If Parliament did not so intend, then in view of the limits of the basis for the exercise of the powers under s. 33D, Parliament did not intend that failure to make a takeover offer should be, or should also be, visited with the Commission's action under s. 33D, but intended that it should only be punished under s. 33B(4).

As to the scope of the Commission's powers under s. 33D, only the power to reprimand in para. (c) and the power to deprive of the facilities of a stock exchange in para. (d) are of a similar nature to the powers in section (10) of the old s. 33. The others are new, although I would group the powers in paras. (e), (f) and (g) with that in para. (d) as, broadly speaking, of the same kind. Paragraph (a) is the power to direct compliance. Paragraph (b) is the power to impose a penalty. Recalling what I said earlier, para. (b) particularly gives added interest to the question whether Parliament intended that failure to make a takeover offer should be visited with any of the actions under s. 33D. Is it intended that the defaulting person be made liable to the criminal penalty under s. 33B(4) as well as the Commission's penalty under para. (b) of s. 33D?

I turn now to the position under the 1998 Code. In the 1998 Code, which the Minister prescribed on 31 December 1998, the obligation to make a takeover offer is expressed in s. 6. Subsection (4) says that "An acquirer to whom this Part applies shall extend an offer to the offeree shareholders in accordance with the requirements of this Code". The Part mentioned is Part II. By s. 6(1)(a), Part II applies to "an acquirer who has obtained control in a company". In s. 2(1) "offeree shareholders" is defined as "holders of voting

shares of the offeree to which the take-over offer relates other than the offeror". The new s. 33(1) of the 1993 Act defines "offeree" as "a company whose voting shares are subject to a take-over offer". The resultant effect of subsection (4) of s. 6 of the 1998 Code is that an acquirer who has obtained control in a company shall extend an offer to holders of voting shares of the company other than the acquirer, in accordance with the requirements of the Code. The effect is similar in nature to that of subsection (2) of s. 33B of the 1993 Act. The effect shows up subsection (4) of s. 6 of the 1998 Code as an attempt to re-enact in the Code on 31 December 1998 what had already been enacted in 1995 in subsection (2) of s. 33B of the 1993 Act. A serious question, therefore, arises whether subsection (4) of s. 6 of the 1998 Code is *ultra vires* the Act, or is a futile provision. It is a fundamental principle of legislation that subsidiary legislation should not provide for what the principal legislation has already provided, resulting in a person having to comply with two provisions about the same matter, more so if the provisions are not identical in wording and impose obligations having different sanctions. If an Act of Parliament prohibits an activity unless licensed in accordance with rules made under it, the rules should only provide for matters relating to licensing but should not also lay down the prohibition again. Thus, with subsection (2) of s. 33B laying down the requirement to make a takeover offer "in accordance with the provisions of the Code", one would expect the Code to make provisions in accordance with which a takeover offer is to be made but not also to lay down again the requirement to make a takeover offer.

Indeed by reflecting on the description in subsection (3) of s. 33A of the matters that the Code that the Minister is empowered to prescribe shall contain, it may become apparent that the Code is not intended to contain the requirement to make a takeover offer. As far as takeover is concerned, the Code is to contain "principles and rules governing the conduct of ail persons or parties involved in a take-over offer ...", which is defined in the new s. 33(1), in relation to a company, as "an offer made to acquire ail or part of the voting shares ... in the company". It is firstly to be observed that the Code is meant to govern conduct. Secondly, it is important to note that the conduct to be governed by the Code is that of persons or parties involved in a takeover offer. There is a presupposition of the existence of a requirement to make a takeover offer and the requirement is to be found to exist in subsection (2) of s. 33B, which envisages, as I have already said, that matters in accordance with which a takeover offer shall be made – procedural matters – shall be provided for in the Code.

The position was different before the new legal regime came about on 1 January 1999. Then, neither s. 179 of the Companies Act 1965 nor the old Part IV of the 1993 Act, imposed an obligation to make an offer. It was left to the Code to be made under s. 179 or the old s. 33(3) of the 1993 Act to do that. Both ss. 179(3) and 33(3) described what the Code was to contain as "general principles and rules to be complied with by all parties concerned in a take-over ... transaction ...". The principles and rules were not said to be those governing the conduct of persons, as subsection (3) of s. 33A now says. Then, the persons were not those involved in a takeover offer, as in subsection (3) of s. 33A, but "persons concerned in a take-over transaction". A "take-over" was defined both in ss. 179(1) and 33(1) as "an acquisition of shares in a company which when aggregated with shares already held by the acquirer, would give the acquirer the right to exercise or control the exercise of more than thirty-three percentum of the voting right of that company". Under that definition, "take-over" referred to the triggering event, the acquisition of shares to attain the thirty-three percentum mark. So persons concerned in a takeover transaction were persons concerned in a transaction relating to or resulting in the acquisition of the triggering shares and the Code could contain general principles or rules to be complied with by such a person, and such a general principle or rule could be a requirement that such a person make an offer as set out in r. 34.1(a) of the 1987 Code.

If, therefore, subsection (4) of s. 6 of the 1998 Code is *ultra vires* and therefore void, then a failure to make a takeover offer is not a failure "to comply with, observe or give effect to any such provision of the Code" and the failure does not provide the condition for the exercise of the Commission's powers under s. 33D and those powers cannot be exercised. By his originating motion, the applicant wants the Commission to make an order under para. (a) of subsection (1) of s. 33D directing IOI and LSC to make an offer. But if the powers under s. 33D cannot be exercised for failure to make a takeover offer, the applicant's originating motion would have no basis and leave to make the application ought not to have been granted.

But the questions that I have been deliberating, at the core of which is the question whether subsection (4) of s. 6 of the 1998 Code is valid, have not been raised or argued in submission before me. IOI and LSC have not raised them. So I shall not take them into consideration in deciding their applications. I have mentioned them only because in the course of scrutinizing the various relevant provisions while preparing this judgment, they emerged starkly to my eyes. They seem to me important and serious questions that, once observed, ought to be mentioned.

To continue with the narrative of events, on 5 February 1999 the Commission wrote to IOI stating that after considering IOI's explanation they had determined (membuat ketetapan) that IOI and LSC comply with subsection (4) of s. 6 of the 1998 Code, that is, they said, carry out a mandatory general offer for the remainder of the voting shares in Palmco. If the determination was meant to be a direction, it would have been a direction under para. (a) of s. 33D(1).

On 27 February 1999 IOI wrote a letter to the Chairman of the Commission appealing under s. 42 of the 1993 Act for a review of the Commission's determination. Section 42 empowers the Commission "to review its own decision under this Act upon an application made by any person who is aggrieved by such decision". IOI gave several reasons. First, they maintained, as they had done before, that the purchase of the 77,000 Palmco shares was a genuine oversight. Secondly, as the presumption of "acting in concert" in s. 33(3) is rebuttable, they asserted that there was in fact no agreement or arrangement between them and LSC to jointly obtain or consolidate control by them of the voting shares in Palmco and that therefore they and LSC were not persons acting in concert. Thirdly, the making of a mandatory general offer would cost IOI RM464,519,100, which would render them insolvent. Fourthly, s. 33D did not have retrospective effect, and when IOI responded to the Commission's show-cause letter they thought that any repercussions would be those specified in the old s. 33(10) which was then in force. It is apparent from the fourth reason that IOI's appeal was made on the assumption that the Commission's determination was a direction under para. (a) of s. 33D(1). IOI appealed that they and LSC be not penalized at all, but that if at all action was to be taken against them, the penalty be one under the old s. 33(10). I take IOI's appeal to be also on behalf of LSC.

LSC also wrote to the Chairman of the Commission. That was on 3 April 1999. It was not an appeal for a review. From its first paragraph, LSC's letter seems to be intended as a record of oral representations made earlier by LSC to the Chairman as a follow-up to IOI's appeal for a review. Essentially, it was a plea in mitigation made in reliance on the argument of inadvertence and on the hitherto unblemished track record of IOI and LSC.

On 28 May 1999 the Commission, purporting to act under s. 33D(1) and by virtue of their power to review their own decision given by s. 42, issued a Public Reprimand of IOI and LSC. I note from para. (iii) at p. 3 of the Public Reprimand that the Commission took the stand that their letter of 5 February was a letter conveying a decision under s. 33A(4)(a), which empowered them to "issue rulings from time to time, interpreting the Code". I quote paras. (iv) and (v) at p. 3 of the Public Reprimand:

(iv) Review of Decision

IOI and LSC had appealed to the SC under Section 42(1) of the SCA for a more lenient penalty as it was represented that IOI would not be in a financial position to undertake a MO. It was submitted that a MO will render the company insolvent with consequential adverse effects on its performance and inevitably, on the position of the minority shareholders.

The letters of appeal were submitted on 27 February 1999 and 3 April 1999 respectively. The SC had considered the grounds of the appeal and noted further that IOI had been a good corporate citizen in the past and that Palmco's performance has improved following the take-over by IOI.

(v) Final Decision

Having taken into consideration the foregoing mitigating factors and the fact that LSC had actually reversed the transaction soon after he realised the breach, the SC decided, pursuant to the said appeal application that a public reprimand is an appropriate penalty for the breach.

On 7 June 1999 the applicant wrote to the Prime Minister and the two Ministers of Finance to state his dissatisfaction with the decision of the Commission. On 9 June 1999 this letter was referred to the Chairman of the Commission for action. On 15 July 1999, after more letters from the applicant to the Prime Minister and the two Finance Ministers and from the applicant's solicitors to the Chairman of the Commission, the Chairman wrote to the Prime Minister and the two Finance Ministers with reference to the applicant's letter of 7 June 1999. The Chairman explained that the Commission's action to inflict public reprimand on IOI and LSC was in line with the law existing when the contravention occurred, particularly the old s. 33(10), under which sanctions were confined to public reprimand and temporary or permanent deprivation of enjoyment of the facilities of a stock exchange, and that public reprimand was inflicted after considering the mitigating factors put forward by IOI. The Chairman further explained that in the Commission's opinion the new ss. 33B and 33D did not have retrospective effect and therefore did not apply to cases, as was the case of IOI and LSC, where the obligation to make a mandatory offer arose before 1 January 1999. The Chairman wrote to the applicant on 19 July 1999 given explanation to the same effect.

In his letter of 7 June 1999 the applicant, while saying that the Commission erred in issuing the public reprimand, did not specifically say what the Commission should have done instead. He did not say that the Commission should have directed IOI and LSC under para. (a) of s. 33D(1) to make a mandatory offer. Neither did his solicitors, Azman Tahir & Co., in their letter to the Commission dated 25 June 1999 say that the Commission should have acted under that paragraph. They said that the appropriate action against IOI

should have been under para. (e) of s. 33D(1), that is, to suspend trading in IOI's shares until they made a takeover offer under s. 33B. As for LSC, they said that the Public Reprimand under s. 33D(1) should be with certain conditions to last until he made a takeover offer under s. 33B. Incidentally it is interesting to note, in relation to the question that I posed earlier about subsection (4) of s. 6 of the 1998 Code, that to the solicitors the obligation to make a takeover offer is under s. 33B. He did not mention subsection (4) of s. 6 of the 1998 Code.

Further letters from the applicant to the Commission followed. Then on 17 December 1999 the applicant wrote to the Prime Minister and the Minister of Finance to say that as he had exhausted all means to resolve the "Palmco Saga" he had decided to sue the Commission. On 23 December 1999 the Chairman of the Commission wrote to the Prime Minister and the Minister of Finance to explain the various issues raised by the applicant in his letter of 17 December. As to the law applicable, the Commission explained what they had explained in their earlier letter of 15 July 1999, namely, that s. 33D was not applicable to the case of IOI and LSC, except that they now specifically said that for that reason they could not invoke para. (a) of s. 33D(1) to direct IOI and LSC to undertake a mandatory offer.

It is also the position taken by IOI and LSC in their present applications that the new s. 33D does not have retrospective effect and therefore the enhanced powers given to the Commission to deal with defaults, such as the power to direct compliance given by para. (a) of subsection (1) and the power to impose a monetary penalty under para. (b) of subsection (1), cannot be used to deal with defaults committed before the section came into force on 1 January 1999. Therefore the Commission could not in law resort to para. (a) to direct compliance by IOI and LSC as the applicant, by their originating motion, wants the Commission to do. That position constitutes one of several grounds on any of which IOI and LSC say that the leave granted to the applicant to apply for mandamus should be set aside.

Although the word "sanction" is not used in s. 33D, as it was used in the old s. 33(10), there can be no doubt that the purpose of s. 33D is to provide penalties for defaulting persons, to be inflicted by the Commission. The section lays down the "actions" that the Commission may take against defaulting persons. Being actions against defaulting persons, they have to be seen as punitive in nature. Besides the general presumption against retrospectivity of an enactment, it must be presumed that penalties are not intended to be retrospective so that a man may be punished with a greater penalty for a default than that which could be inflicted on him when he did it. Apart from the fact that it would be unjust to the defaulter to act against him in a manner

more severe than he was entitled to expect when he committed the default, there is also the consideration that different defaulters will suffer differences in severity of treatment for the same default committed before the change to enhance the penalty takes place, depending on whether they are dealt with before or after the change takes place. It must be presumed that Parliament did not intend that such an anomaly should arise under s. 33D. It would not arise if the enhanced powers of the Commission to deal with defaulters were construed as applicable only to defaults occurring after 1 January 1999.

At the end of the day, the applicant advanced three reasons for contending that the enlarged powers in s. 33D could be exercised in this case against IOI and LSC. The reasons are, first, that s. 21 of the amending Act A 926 says so; second, that the powers under s. 33D are procedural; and, third, that the amendments introduced by Act A 926 did not impose a new liability on IOI and LSC. The second and third reasons may be taken together and I do not hesitate to reject them. The powers under s. 33D are not procedural. They are punitive in nature and, when exercised, impose burdens on defaulters, and if the enhanced powers are exercised in respect of defaults that had been committed before 1 January 1999, the defaulters would be burdened with a new liability that they did not have in their contemplation before 1 January 1999, such as the liability to comply with the Commission's direction or the liability to the monetary penalty.

As for s. 21 of the amending Act A 926, it reads as follows:

> 21. For the avoidance of doubt, the provisions introduced or amended by this Act shall apply to:
>
> (a) all proposals submitted;
>
> (b) take-over mergers or compulsory acquisition made,
>
> before or pending at the date of coming into force of this Act.

Counsel for the applicant submitted that the takeover of Palmco was pending when Act A 926 came into force on 1 January 1999 and therefore the provisions introduced or amended by the Act shall apply to the takeover.

It is a very vague and general provision, drafted apparently without discriminative regard to the nature of the provisions introduced or amended. It is made for avoidance of doubt and not with a specific question in mind, such as the question of retrospectivity of the enhanced powers under s. 33D. Being for avoidance of doubt, it seems to intend to clarify what one would normally expect to be the position, namely the retrospective operation of

procedural provisions to pending matters. It certainly could not apply so as to render IOI or LSC liable to be prosecuted for an offence under s. 33D(4) for a default that was committed before the offence came into being because art. 7 of the Federal Constitution forbids it. It certainly cannot be intended to answer the question whether the Commission's monetary penalty under para. (b) of s. 33D(1) can be imposed for a default committed before 1 January 1999. It will require clear and specific words, which s. 21 does not have, to overcome the presumption that the enhanced powers in s. 33D do not have the retrospective effect of being exercisable for defaults committed before 1 January 1999.

In any event I do not think that a takeover of Palmco was pending on 1 January 1999. Act A 926 itself does not have a definition of "take-over" for the purposes of its s. 21. Neither does it introduce a definition for the purposes of Division 2 of the new Part IV of the 1993 Act. As earlier stated, the repealed s. 179(1) of the Companies Act 1965 and the old s. 33(1) of the 1993 Act did have a definition of "take-over" by which the term meant the acquisition of more than thirty-three percentum of voting right, that is, the triggering event. What we have now is only a definition of "take-over offer" in the new s. 33(1). It means "an offer made to acquire all or part of the voting shares ... in the company", that is, an offer made to acquire the remainder of the voting shares, after the happening of the triggering event of acquisition of more than thirty-three percentum. The implication from the definition of "take-over offer" is that a takeover is the acquisition of the remainder of the voting shares and not, as under the previous regime, the acquisition of the triggering thirty-three percentum. The word "pending" in s. 21 must refer to a definite situation, and if it means awaiting or in the process of attainment, it must imply that a takeover is already planned. In this case it cannot be said that a takeover, that is the acquisition of the remainder of the voting shares, was pending on 1 January 1999 within the meaning of s. 21, considering that IOI and LSC, whom the applicant wants to be directed to make a takeover offer, had not done so because either they were claiming that they were not obliged to do so or that they were not liable to be directed to do so.

Learned counsel for the applicant referred to the earlier action of the Commission taken by their letter dated 5 February 1999. On the basis of that letter, he maintained that the Commission was then already acting under para. (a) of s. 33D(1). The suggestion was that at that stage the Commission took the stand that the enhanced powers conferred by s. 33D could be exercised in respect of defaults before 1 January 1999. It will be recalled that in the Public Reprimand of 28 May 1999 the Commission said that the letter of 5 February 1999 conveyed the "decision" that IOI and LSC had breached the

1998 Code and had to undertake a mandatory offer and that the "decision" was made under s. 33A(4)(a), which empowered the Commission to "issue rulings from time to time, interpreting the Code". Therefore, to go by what the Commission said in the Public Reprimand, the decision conveyed by the letter of 5 February 1999 was not a direction under para. (a) of s. 33D(1). It has not been suggested that the statement in the Public Reprimand was not true and I do not see any reason for the statement not to be the truth considering that the applicant's complaints against the Commission arose only after the Public Reprimand was published. There is moreover the fact that by the letter of 5 February 1999 the Commission were not directing, which, if they were, would render the letter a direction under para. (a) of s. 33D(1). What the letter said the Commission had done was to determine that IOI and LSC comply with subsection (4) of s. 6 of the 1998 Code. I suppose that could be called a ruling that interpreted the Code. But it nevertheless strikes me as very strange that an action that commenced with a show-cause letter that threatened action under the old s. 33(10) should have ended at that stage not with action but with an interpretive ruling. But whatever the reason may be for that, the true position in law must prevail and the position is that the power to direct compliance given by para. (a) of s. 33D(1) is not retrospective and cannot be exercised in respect of defaults occurring before 1 January 1999. There is therefore no question of the Commission being ordered by mandamus to act under that section, as the applicant wishes. That alone is a sufficient ground for setting aside the leave given to the applicant, that is if setting aside is still available in view of O. 53 r. 9 mentioned earlier, and for striking out the originating motion issued pursuant to the leave. I do not propose to determine the other grounds, except for one thing.

One of the other grounds for these applications is that this was not a case of refusal or failure to act and therefore mandamus ought not to issue to compel the Commission to act, and to act in a particular way. That ground would only be relevant if the law is that all the powers under s. 33D(1) are exercisable in this case. But if they are, this ground cannot succeed. The Commission's stand, as revealed by their letters, was that the new powers under s. 33D(1) could not be exercised. If the Commission were wrong and the powers could be exercised, then there has been a failure to consider exercising the new powers. The applicant will of course still not be entitled to demand that the Commission be ordered to exercise only the power under para. (a) of s. 33D(1). But I suppose that in that event, assuming that IOI and LSC do not succeed on any other ground, the court could remit the case back to the Commission to reconsider their appeals in the light of the applicability of the enhanced powers.

I go back now to the question of O. 53 r. 9. If I were to interpret the rule in favour of the applicant, these applications will be struck out and the leave will not be set aside although my findings on the merits show that leave ought not to have been granted. IOI and LSC might appeal against the striking out and might or might not succeed. If they succeed, their applications will be reinstated and my findings on the merits will hold sway unless the applicant cross-appeals against those findings. If IOI and LSC fail in their appeal or if they choose not to appeal, the applicant's originating motion will be heard and the question of para. (a) of s. 33D(1) will be up for decision again. Whichever way it is decided, it may be subject to appeal until a final decision is reached. It would save time and money if I decide now on these applications to dismiss the originating motion as a consequence of my finding about para. (a) of s. 33D(1). I think everyone has said all that they had to say on the subject. What I am prohibited by O. 53 r. 9 from doing is entertaining an application to set aside the leave. It does not prohibit me from finding, from the view that I have taken of para. (a) of s. 33D(1), that the originating motion has no reasonable prospect of success and striking it out for that reason. There will of course be an appeal leading to a final decision on that paragraph. That decision has to be made at some final stage whichever course I take now. And I think the best course is the one that saves time and money, that is, to strike out the originating motion. Counsel for IOI and LSC argue that I can do it and has urged me to do it and I will do it and even though it may not be correct, the ultimate destiny of this case, whatever it might be, will be the same if I did not do it. Perhaps, after all, I should have acceded to the request of counsel for the applicant and the Commission made on the first day of hearing that the applications of the applicant, IOI and LSC be heard at one go.

I accordingly strike out the applicant's originating motion with costs for the Commission, IOI and LSC.